IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.V.K.BALI
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

FRIDAY, THE 5TH JANUARY 2007 / 15TH POUSHA 1928

WA.No. 1326 of 2006(C)

AGAINST THE JUDGEMENT IN WPC.6706/2006
.....

APPELLANTS: RESPONDENTS
---

1. STATE OF KERALA,
REP. BY THE SECRETARY,
DEPARTMENT OF GENERAL EDUCATION,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

2. THE DISTRICT EDUCATIONAL OFFICER,
ATTINGAL.

BY ADVOCATE GENERAL SRI. C.P. SUDHAKARA PRASAD
GOVERNMENT PLEADER SRI. M.R. SABU

RESPONDENTS: PETITIONER

SABARMATHI CHARITABLE SOCIETY HAVING
ITS REGISTERED AND ADMINISTRATIVE OFFICE AT
MULAVANA AANAKKUDI.P.O, VAMANAPURAM,
THIRUVANANTHAPURAM, REP. BY ITS PRESIDENT
R.M.PARAMESWARAN.

BY ADV. SRI.V.GIRI
SRI.SHINOD
SRI.P.I.DAVIS
SRI.T.M.ABDUL LATHEEF
SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.PETER JOSE CHRISTO
SRI.K.A.BALAN
SRI.ESM.KABEER

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20/12/2006
A/W. W.A.NO. 1325/2006 THE COURT, ON 05/01/2007, DELIVERED THE
FOLLOWING:

V.K. Bali, C.J. & S. Siri Jagan, J.

=-=-=-=-=-=-=-=-=-=-=-=-=-=-=-=-=-=-=

W. A. Nos. 1325 & 1326 of 2006

=-=-=-=-=-=-=-=-=-=-=-=-=-=-=-=-=-=-=

Dated this, the 5th January, 2006.

J U D G M E N T

Siri Jagan, J.

Ten years before the Parliament decided to include Right to Education as a fundamental right under Part III of the Constitution of India by introducing Article 21A through the Constitution (86th Amendment) Act, 2002, the Supreme Court had considered the scope of right to education in the Indian context in the decision of Mohini Jain (Miss) v. State of Karnataka and others, reported in (1992) 3 SCC 666. In that case, the Supreme Court inter alia considered the question as to whether there is a "right to education guaranteed to the people of India under the Constitution" and held as follows in respect of that issue:

> "6. In order to appreciate the first point posed by us it is necessary to refer to various provisions of the Constitution of India. The Preamble promises to secure to all citizens of India "justice, social, economic and political" and "liberty of thought, expression, belief,faith and worship". It further provides "equality of status and of opportunity" and assures dignity of the individual. Articles 21, 38, 39(a) and (f), 41 and 45 of the Constitution are reproduced hereunder:
>
> > "21. Protection of life and personal liberty:- No person shall be deprived of his life or personal liberty except according to procedure established by law.
> >
> > 38. State to secure a social order for the promotion of welfare of the people:- (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
> >
> > (2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

> 39. Certain principles of policy to be followed by the State: - The State shall, in particular, direct its policy towards securing--
>
> (a) that the citizens, men and women equally, have the right to an adequate means of livelihood.
>
> xx xx xx
>
> (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
>
> 41. Right to work, to education and to public assistance in certain cases:- The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other areas of undeserved want.
>
> 45. Provision for free and compulsory education for children:- The State shall endeavour to provide within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

7. It is no doubt correct that "right to education" as such has not been guaranteed as a fundamental right under Part III of the Constitution but reading the above-quoted provisions cumulatively it becomes clear that the framers of the Constitution made it obligatory for the State to provide education for its citizens.

8. The Preamble promises to secure justice "social, economic and political' for the citizens. A peculiar feature of the Indian Constitution is that it combines social and economic right along with political and justiciable legal rights. The Preamble embodies the goal which the State has to achieve in order to establish social justice and to make the masses free in the positive sense. The securing of social justice has been specifically enjoined an object of the State under Article 38 of the Constitution. Can the objective which has been so prominently pronounced in the Preamble and Article 38 of the Constitution be achieved without providing eduction to the large majority of citizen who are illiterate. The objectives flowing from the Preamble cannot be achieved and shall remain on paper unless the people in this country are educated. The three-pronged justice promised by the Preamble is only an illusion to the teaming millions

who are illiterate. It is only education which equips a citizen to participate in achieving the objectives enshrined in the Preamble. The Preamble further assures the dignity of the individual. The Constitution seeks to achieve this object by guaranteeing fundamental rights to each individual which he can enforce through court of law if necessary. The Directive Principles in Part IV of the Constitution are also with the same objective. The dignity of man is inviolable. It is the duty of the State to respect and protect the same. It is primarily education which brings forth the dignity of a man. The framers of the Constitution were aware that more than seventy per cent of the people, to whom they were giving the Constitution of India, were illiterate. They were also hopeful that within a period of ten years illiteracy would be wiped out from the country. It was with that hope that Articles 41 and 45 were brought in Chapter IV of the Constitution. An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him. This is why the Universal Declaration of Human Rights 1948 emphasises: "Education shall be directed to the full development of the human personality . . . . ." Article 41 in Chapter IV of the Constitution recognises an individual's right "to education". It says that "the State shall, within the limits of its economic capacity and development, make effective provision for securing the right . . . to education . . . . ." Although a citizen cannot enforce the Directive Principles contained in Chapter IV of the Constitution but these were not intended to be mere pious declarations. We may quote the words of Dr. Ambedkar in that respect:

> "In Enacting this Part of the Constitution, the Assembly is giving certain directions to the future legislature and the future executive to show in what manner they are to exercise the legislative legislative and the executive power they will have. Surely it is not the intention to introduce in this Part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles but that they should be made the basis of all legislative and executive action that they may be taking hereafter in the matter of the governance of the country."
>
> (C.A.D. Vol. VII, p. 476)

9. The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority

which is illiterate.

xx xx xx

12. "Right to life" is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.

13. The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity.

14. The "right to education" therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society. . . . . ."

As is clear from the above judgment, even prior to the introduction of Article 21A in the Constitution of India, although the right to education was only a Directive Principle of State Policy included in Articles 41 and 45 of the Constitution of India, the Supreme Court held that right to education is concomitant to the fundamental rights enshrined under Part III of the Constitution. By the above said Constitution Amendment Act, right to education has been expressly made a fundamental right by introducing Article 21A in Part III of the Constitution of India. Article 21A reads thus:

"**21A. Right to education**:- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

2. Since, in these cases, another Directive Principle of State

Policy also comes into play, we shall extract that also hereunder before discussing the issues involved. The same is contained in Article 46, which reads thus:

> **"46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections**:- The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

3. The question involved in these writ appeals is whether the action of the Government of Kerala in the matter of refusing to consider the application submitted by the 1st respondent-Sabarmathi Charitable Society (for short 'the Society") in W.A.No. 1326/2006 for permission to start a school in Ward No. V of Pulimath Panchayat within the Attingal Educational District, offends the mandates in the above said Articles of the Constitution of India.

4. The facts are very simple. The Society applied to the Government for sanctioning of an aided school with standards I to X and Higher Secondary classes in the aided sector in Ward No. V of Pulimath Panchayat. The same was originally declined by Ext. P30 order directing the Society to submit the application to the proper authority at the appropriate time when the Government takes a policy decision to open/upgrade new aided/Government schools in the State. The Society approached this Court challenging Ext. P30 order in W.P (C) No. 31976/2005, which was disposed of by Ext. P31 judgment directing the Government to reconsider the issue after hearing the petitioner and taking into account orders of the Government allowing similar applications in respect of other areas in Kerala and in the light of the recommendation of the District Educational Officer, Attingal. In accordance with the said judgment, the Government re-considered the application of the Society and by Ext. P33 order,

rejected the same again holding that the case of the Society can be considered as and when Government takes a general policy decision to open/upgrade aided schools in the State. Ext. P33 order was challenged in W.P(C) No. 6706/2006 by the Society. A Society, by name, Scheduled Caste, Scheduled Tribe Welfare Society of Kerala also filed W.P(C) No. 6636/2006 challenging the very same order and seeking a direction to the Government to grant an aided school with classes I to XII in Pulimath Panchayat in Kilimanoor Constituency, considering the educational need of that locality. These two writ petitions were heard together by a learned Single Judge of this Court who, by the impugned common judgment, allowed the writ petitions and issued a direction to the Government of Kerala to accord sanction to the 1st respondent-Society in W.A.No. 1326/2006 to start a new school in Ward No. V of Pulimath Panchayat in Attingal Educational District and to issue orders sanctioning the school with primary and secondary classes forthwith so that the Society can start functioning of the school during the ensuing academic year 2006-207 itself. The said judgment is under challenge in these two writ appeals at the instance of the State of Kerala.

5. Originally, the appellant-State contested the writ petitions on two grounds. They are: (a) Sanctioning of a new school or upgradation of an existing one is dependent on the policy decision of the Government and such a decision has not been taken so far by the Government. (b) There is no provision in the Kerala Educational Rules to sanction a school directly to a person and a trust and the same can be sanctioned only after issuance of a notification calling for objections. At that time, it was practically conceded by the Government that there was educational need in Ward No. V of Pulimath Panchayath and the area in question is educationally,

socially and economically backward as the area is mostly inhabited by scheduled caste families and there is a tribal colony spread over 900 acres in the said area. The learned Single Judge, after noting that the educational need of the locality is conceded and that the area is a socially and educationally backward area, repelled the contentions of the State regarding the Government policy and want of necessity to comply with the procedure prescribed under the Kerala Education Rules. Thereafter, the State filed two review petitions taking a new stand that there is no educational need, based upon two reports obtained after the passing of the judgment by the learned Single Judge. The said review petitions, namely, R.P.Nos. 410 and 404 of 2006 in W.P(C) Nos. 6636/2006 and 6706/2006, respectively were also dismissed by the learned Single Judge. It is under the above said circumstances that the State has filed these writ appeals against the said common judgment in the two writ petitions.

6. Of course, in these writ appeals, in addition to the two grounds on which the State contested the writ petitions, an additional ground of lack of educational need also has been pressed into service.

7. Before going into the issues involved, we may also note the provisions of the Kerala Education Rules regarding the opening and recognition of schools contained in Chapter V of the Kerala Education Rules. Rules 2 and 2A are the relevant Rules based on which the 2nd contention of the appellant has been built up. They read as under:

> "**2. Procedure for determining the areas where new schools are to be opened or existing schools upgraded**:- (1) The Director may, from time to time, prepare two lists, one in respect of aided schools and the other in respect of recognised schools, indicating the localities were new schools of any or all grades are to be opened and existing Lower Primary School or Upper Primary Schools or both are to be upgraded. In preparing such lists he shall take into consideration the following:
>
> (a) the existing schools in and around the locality in which new

schools are to be opened or existing schools are to be upgraded;

(b) the strength of the several standards and the accommodation available in each of the existing schools in that locality;

(c) the distance from each of the existing schools to the area where new schools are proposed to be opened or to the area where existing schools are to be upgraded;

(d) the educational needs of the locality with reference to the habitation and backwardness of the area; and

(e) other matters which he considers relevant and necessary in this connection.

Explanation:- For the removal of doubts it is hereby clarified that it shall not be necessary to prepare the two lists simultaneously and that it shall be open to the Director to prepare only one of the lists.

(2) A list prepared by the Director under Sub-rule (1) shall be published in the Gazette, inviting objections or representations against such list. Objections, if any, can be filed against the list published within one month from the date of publication of the list. Such objection shall be filed before the Assistant Educational Officers or the District Educational Officers as the case may be. Every objection filed shall be accompanied by chalan for Rs. 10/- remitted into the Treasury. Objections filed without the necessary Chalan receipt shall be summarily rejected.

(3) The Assistant Educational Officer and the District Educational Officer may thereafter conduct enquiries, hear the parties, visit the areas and sent their report with their views on the objections raised to the Director within two months from the last date of receipt of the objections. The Director, if found necessary, may also hear the parties and finalise the list and send his recommendations with the final list to Government within two months from the last date of the receipt of the report from the Educational Officers.

(4) The Government after scrutinising all the records may approve the list with or without modification and forward the same to the Director within one month from the last date for the receipt of the recommendations of the Director. The list as approved by the Government shall be published by the Director in the Gazette.

(5) No appeal or revision shall lie against the final list published by the Director.

Provided that the Government may either suo motu or on

application by any person objecting to the list published by the Director under sub-rule (4) made before the expiry of thirty days from the date of such publication review their order finalising such list and make such modifications in that list as they deem fit by way of additions or omissions, if they are satisfied that any relevant ground has not been taken into consideration or any irrelevant ground has been taken into consideration or any relevant fact has not been taken into account while finalising the said list:

Provided further that no modification shall be made under the preceding proviso without giving any person likely to be affected thereby an opportunity to make representation against such modifications.

(5A) The proviso added to sub-rule (5) by the Kerala Education (Amendment) Rules, 1981 published in the Kerala Gazette extraordinary No. 667, dated the 19th August 1981, shall be deemed to have been added to that sub-rule with effect on and from the 1st day of June 1981.

(6) The Govt. may, by notification in the Gazette, extend any period specified in sub-rules (3) and (4) for reasons to be stated in the notification.

2A. Applications for opening of new schools and upgrading of existing schools:- (1) After the publication of the final list of the areas where new school o of any or all grades are to be opened or existing Lower Primary Schools or Upper Primary schools or both are to be upgraded the Director shall, by a notification in the Gazette call for applications for the opening of New schools of any or all grades and for raising of the grade of existing Lower Primary schools or Upper Primary Schools or both in the areas specified.

(2) Applications for opening of new schools or for raising of grade of existing schools shall be submitted only in response to the notification published by the Director. Applications received otherwise shall not be considered. The applications shall be submitted to the District Educational Officer of the area concerned in form No. 1 with 4 copies of the application and enclosures within one month from the date of publication of the notification under sub-rule (1).

(3) On receipt of the applications for permission to open new schools or for upgrading of existing schools, the District Educational Officer shall make such enquiries as he may deem fit as to the correctness of the statements made in the application and other relevant matters regarding such applications and forward the applications with his report thereon to the Director within one month from the last date for submitting applications under sub--rule (2).

(4) The Director on receipt of the applications wit the report of the District Educational Officer shall forward the applications with his report to Government within one month from the last date for forwarding the report by the District Educational Officer.

(5) The Government shall consider the applications in the light of the report of the District Educational Officer and the Director and other relevant matters which the Government think necessary to be considered in this connection and shall take a final decision and publish their decision in the Gazette with the list containing necessary particulars within one month from the last date for forwarding the report by the Director.

(6) Applications for permission to open a new standard in an existing school during any school year not involving the raising of the grade of the school shall be submitted to the District Educational Officer in charge of the area in form 1 in triplicate.

(7) x x x x

(8) The Government may, by notification in the Gazette, extend any period specified in sub-rules (3), (4) and (5) for reasons to be stated in the notification."

8. Since educational need has been brought up as an issue now by the State of Kerala, although the same was absent in the counter affidavit filed in the writ petitions and since without educational need, no school can be sanctioned in any area, we deem it fit to consider that question first.

9. For proving educational need, the Society relied on Ext. P21 field report of the District Educational Officer. The DEO recommended that the proposed site of the school in question is in a remote area in Ward No. V of Pulimath Panchayat in Kilimanoor Constituency where there are no schools, both private and Government, since the existing schools are at a distance ranging between 4 to 8 kms. The report of the DEO stated that a child above 5 years in the area has to travel 4 kms. for his primary education and 6 kms. for his High School education. It was the further opinion of the DEO that the proposed area is educationally, socially and

economically backward. The 1st respondent also relied upon certain Government Orders by which the Government itself had sanctioned new schools in some other areas in the State the reasons for granting which, according to the petitioners in the writ petitions, were applicable to the area in question also. Those orders are Exts. P24, P25, P26, P27 and P28. In Ext. P30 order, the Government had originally rejected the application filed by the Sabarmathi Society. However, it was stated as follows in paragraph 11 of that order:

> "11. Even though the Sabarmathy Charitable Society is eligible to get sanction for an aided school, as there is educational need in the area, there is no provision in Kerala Educational Rules to sanction school directly to a person or a trust as per Chapter V Kerala Education Rules. As per the statutory provisions, objections are to be called for before sanctioning a new school, even if the educational need is confirmed. Further a policy decision has to be taken by Government to open/upgrade new aided/Government schools in the State at present. A notification calling for objections has to be published first and then a final notification for sanctioning the school has also to be issued. As to the question of policy matter regarding sanction of new schools, Government have not yet taken a decision."
>
> (Emphasis supplied)

10. In this connection, it may also be relevant to note the contentions of the State in the counter affidavit filed in W.P(C) No. 6706/2002. Paragraph 3 of the counter affidavit reads thus:

> "3. It is submitted that Pulimath Panchayat has High Schools which are at a distance of 6 to 8 Kms from the proposed site where the petitioner intends to start the school. This is a remote area in Ward No. V of Pulimath Panchayat in Kilimanoor Assembly Constituency. There are a large number of LP/UP/HS in the Attingal and Kilimanoor educational sub-districts. A list showing the schools (LS/UP) available in the Attingal educational district [AEO Attingal/AEO Kilimannoor] is produced herewith and marked as **Exhibit R1(a)**. However, the proposed area is educationally, socially and economically backward. It is mostly inhabited by Scheduled Caste families. There is a tribal colony spread over 900 acres in the said area. There was a school in Kuttimoodu in Pulimath Village named 'Depressed Class League Vilasom LP School founded by S. Krishnan, leader of the Depressed Class, in the year1964. But this was destroyed by some miscreants and anti-social elements. This was

followed by an enquiry into the matter by the Scheduled Castes/Scheduled Tribe Welfare Committee of the Legislature in the petition made by V. Krishnan, the then Manager of the school which recommended for the sanctioning of a school in that place. However, many educational agencies and individuals have since approached Government for establishing their claim over the above mentioned destroyed school. One such claim filed by Shri. C. Raman is under consideration in Government file No. 12389/73/06/G. Edn. Exts. P2 and Ext. P3 applications by the petitioner were rejected on the ground that Government have not taken a policy decision to open/upgrade new aided/Government schools in the State."

(Emphasis supplied)

Again, in paragraph 6, it is stated thus:

"6. It is submitted that Ext. P8 representation by Kerala Pulayan Mahajanasabha supporting the demand of the petitioner was also turned down pointing out the financial position and policy decision. Government have granted schools to certain institutions in selected areas in the wake of National Educational Policy on the basis of which Plus Two Courses were introduced in the State. It was done only to compensate the loss occurred to their institution as a result of abolition of Pre-degree course in their institutions. It is true that there is no High School within a distance of 6 to 8 Kms from the proposed site of the petitioner to cater to the educational need of the area. But the request of the petitioner being to open an aided school, Government cannot allow this in the absence of a general policy decision and without following the statutory procedure."

(Emphasis supplied)

Paragraph 16 deals with the report of the DEO, which reads thus:

"16. It is most respectfully submitted that the averments raised in the grounds are without any merits and liable to be dismissed. Government have examined all the relevant factors for sanctioning an aided school in Ward No. V of Pulimath Village as requested in Ext. P2 application. Though the District Educational Officer, Attingal has reported an educational need in the area many factors prevent the Government from taking a favourable decision. No policy decision has been taken by Government. The State is following strict economy measures. Moreover as per Chapter V of Kerala Educational Rules there is no provision to sanction a school directly to a person or a trust. All this factors led to the issuance of Ext. P33 order."

(Emphasis supplied)

Again, in paragraph 18, the Government contends as follows:

"18. It is submitted that the contentions of the petitioner are not true to facts. Educational need is not the only criterion for

> sanctioning a school. For sanctioning an aided school, policy decision of the Government, financial position of the State etc should also be taken into consideration."
>
> (Emphasis supplied)

A reading of the above order and counter affidavit would go to show that at any time before filing the review petitions in the two writ petitions, the Government had no case that there was no educational need in the area in question. On the other hand, the specific case of the Government was that there was in fact educational need and that the proposed area is educationally, socially and economically backward and the area is mostly inhabited by scheduled caste families there being a tribal colony spread over 900 acres in the said area. They also refer to an earlier school run by an organisation called Depressed Class League Vilasom L.P. School, which had to be closed down for want of sufficient students and later destroyed by miscreants. Government also admits that many educational agencies and individuals have approached the Government for establishing a school in the place of the destroyed school.

11. In fact, this Court had appointed two Advocate Commissioners to ascertain the facts relating to the educational need of the locality. The Commissioners have reported that as per the 2001 census, the population of the erstwhile Ward V of Pulimath Panchayat (which on later delimitation, formed part of the present Ward No. VI and a portion of the present Ward No. VII) is 1849 of which 607 belong to scheduled caste and 4 belong to schedule tribe communities. It is also reported that out of the 451 families in the said Ward, 122 families belong to schedule castes and one belongs to scheduled tribes. Going by the said data, 1/3rd of the population of the area in question comprises of scheduled caste and scheduled tribe communities, which is substantial considering the overall scheduled caste/scheduled tribe population in the State. However, the

Commissioners reported that they were not able to locate the tribal colony of 900 acres since parties were not able to point out such an area. They also noted that the report of the Scheduled Castes/Scheduled Tribe Welfare Committee of the 10th Kerala Legislative assembly dated 17-3-1997 referred to a tribal colony in the Panchayat. From the report of the Commissioners, it can be seen that in Pulimath Panchayat, there were no Higher Secondary Schools whereas in all the neighbouring five Panchayats, there were one or more Higher Secondary Schools. The nearest L.P. School from the area in question is 3.9 kms. away. The nearest U.P. School is 4.7 Kms. away. The nearest High School is almost 6 kms. away. As such, even going by the report of the Commissioners themselves, educational need of the locality is more than apparent although in their final opinion, the Advocate Commissioners were not very clear about the same.

12. The Government have also raised a contention that because of a well and a 11 KV line passing through the proposed location of the school, the location is unsuitable for establishing a school. However, the Commissioners did not find the existence of the well and the 11 KV line as a threat to the safety of the children and noted that the very same 11 KV line passes over the school building of a nearby L.P. School, namely, Thachonam LP School, Mullakkara. In the course of arguments, counsel for the 1st respondent raised a contention that since there was an earlier L.P School which was stopped and destroyed, the educational need can be presumed. In the wake of this contention, the State has filed an additional affidavit stating that the said school was stopped in the year1974 and thereafter some other schools have already been sanctioned in the locality. We do not deem it necessary to go into this question since,

admittedly, the present area under consideration is at least 4.5 kms. away from the site of the erstwhile school, which was later stopped and destroyed.

13. From the above, it is abundantly clear that there is overwhelming evidence to prove the educational need of the locality. The Commissioners have reported that although starting of a new school in the present locality may adversely affect the student strength of the nearby schools, there is no conclusive proof regarding the same. In any event, as pointed out by the learned counsel for the Society, the very fact that there is such a likelihood of fall in student strength of the other schools in the locality itself, to a great extent, suggest the educational need in the present locality. As such, we are satisfied that we need not look any further to conclude that there is in fact educational need in the locality where the Society proposes to establish the new school.

14. Having found the educational need, we shall move on to the other two contentions of the appellant-State. First is that there is no policy decision by the Government to sanction new schools. But the learned Single Judge found that the Government does not have a case that no new school has been started in the State in view of such a policy decision taken by the Government in this regard. In the wake of the documents produced by the Society to show that despite the so called policy decision or lack of the same, the Government have in fact allowed several schools in other areas of the State, the Government gives a justification for the same in the impugned order. In paragraph 5 of Ext. P33 order, it is stated as follows:

> "5. The Ext. P25 was issued due to special circumstances prevailing in the area at Melmuri Village. There was no High School within a radius of 7 Kms. The children hailing from socially, economically and educationally backward families residing at Melmuri find it difficult to pursue their studies after Lower Primary

> section for want of UP and HS in that locality. The sanction of all the above schools as per Ext. P24, 25 & 26 is due to special circumstances in order to avoid the difficulties being experienced by the students to pursue their school education."
>
> (Underlining supplied)

In respect of sanctioning of a school in favour of other persons in other localities in the State, in the counter affidavit filed by the State in W.P(C) No. 6706/2006 also, they have given justification for such orders. Paragraph 13 of the counter affidavit reads thus:

> "13. It is submitted that there are special circumstances which led to the issuance of Ext. P24 order for upgradation of 2 UP Schools in Malappuram District. Both the schools in Ext. P24 order are situated in remote areas which are mostly inhabited by SC, ST, Muslims and Backward Communities. There is a distance of 3.5 to 6 Kms from the nearest schools. Since the facility for secondary education is in a far off place,some of the pupils discontinue their studies, which goes against the scheme for universal elementary and secondary education. These schools enjoy better student strength. The eligibility for upgradation of the school has already been established. There are certain unavoidable circumstances which led to the issuance of Ext. P25 order. In Melmuri village in Malappuram District there are six Scheduled Castes colonies and no High School within a radius of 7 Kms. The area is socially, economically and educationally backward. The Director of Public Instruction also recommended the proposal of opening High School in Melmuri as it would benefit 6000 families. Ext. P26 order was issued consequent to the abolition of Pre-Degree Courses in the state. For the introduction of Plus Two Course High School became inevitable. Hence Ext. P26 was issued as a special case. Petitioner's request is to sanction an aided school from I to X Standards in Ward No. V of Pulimath Village. The case of the petitioner is different when compared to the Exhibits produced by him. There is an absolute prohibition in the Rules that unless applications are submitted in response to a notification, they need not be attended to. Sanctioning of new schools in the aided/unaided sector has impact upon other institutions functioning in that locality. In certain cases, it may even lead to closure of existing schools or retrenchment of staff. The additional financial impact resulting from the grant of aided schools also is a relevant criterion. There is no Government policy to sanction Aided Schools i the State at present. No Educational Survey has been conducted for sanctioning new Aided Schools. More over as per Rule 2 A(2) Chapter V Kerala Education Rules application for opening of new School shall be submitted only in response to the notification published by the Director of Public Instruction. Application received otherwise shall not be considered. In this case no notification has been published by the Director of

Public Instruction for opening Aided Schools."

(Underlining supplied)

15. We are of opinion that in view of our findings on the first issue regarding educational need, the very same justification offered by the Government for sanctioning other schools in other parts of the State emphasised by the underlined portions above would squarely apply to the case at hand. In fact, the situation is exactly identical to those cases. Having decided to grant such schools, taking into account identical situation, notwithstanding the Government policy or lack of the same, we are at a loss to understand how the very same yardstick cannot be applied to the locality in question.

16. Apart from the same, we doubt very much as to whether, after finding educational need in a locality, the Government can by taking refuge under a policy decision or lack of it refuse to sanction a school in an area where there is admitted educational need. If that is permitted, then that would amount to defeating the constitutional mandates of articles 21A, 41, 45 and 46 of the Constitution of India. It is like saying that although people of an area is suffering from acute scarcity of water, because of a policy decision, Government will not provide water to the people of that area. When Constitution mandates that citizens have a fundamental right for something, the Government cannot simply refuse them their constitutional rights in the name of a Government policy or lack of it. The right to education is a fundamental right guaranteed by the Constitution of India. When educational need in an area is found as a matter of fact, we are of opinion that the Government cannot deny that fundamental right to the citizens of the locality on the ground that Government have not taken a policy decision to grant new schools in the State or have taken a policy decision not to grant. Further, even as admitted by the

appellant-State itself, the area in question is a socially, economically and educationally backward area wherein 1/3rd of the population consists of scheduled castes and scheduled tribes. When Article 46 mandates that State shall promote with special care the educational and economic interests of the weaker sections of the society, and in particular, scheduled castes and scheduled tribes, the denial of right to education to the people of that area would be a social injustice to them and would amount to violation of the constitutional mandate. It is in this context we chose to start this judgment by extracting the relevant paragraphs from the judgment of Supreme Court in Mohini Jain's case (supra) wherein the Supreme Court had categorically held that Directive Principles are mandates to the State to eradicate poverty so that the poor of this country can enjoy the right guaranteed under the Constitution. As held in Mohini Jain's case, when the preamble promises to secure justice, social, economic and political for the citizens, the objectives flowing from the preamble cannot be achieved and shall remain on paper unless the people of this country are educated. The directive principles are also framed with the same objective. The Directive Principles, which are fundamental in the governance of this country, cannot be isolated from the fundamental rights guaranteed under Part III of the Constitution of India and therefore these principles are to be read into the fundamental rights. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. As such, the citizens of the locality in question have been evidently deprived of both the benefits of Article 21 A as well as Articles 45 and 46 of the Constitution. That being so, we also endorse the view of the learned Single Judge that Government cannot refuse permission to start a new school in the

locality in question under the guise of want of a Government policy in that regard. Therefore, we do not find any merit in the contentions of the Government on that issue as well.

17. Then comes the question as to whether the Government can, without first resorting to the procedure prescribed under Rules 2 and 2A of Chapter V of the Kerala Education Rules, permit starting of a new school. In this connection, it is interesting to note that while granting the schools in other areas, which is relied upon by the Subarmathi Society in support of their case, also the procedure prescribed under those rules was not followed. In the impugned order, the Government itself justified the same in paragraph 6 as follows:

> "6. The allegation, that the sanctioning of these schools without complying with the procedure laid down in the Kerala Education Rules, is absolutely incorrect. The decision in the above schools is taken by the Council of ministers. It is pertinent to note that Government is vested with power under Rule 3 of Chap. I Kerala Education Rules for dispensing with or relaxing the requirement of any Rule in any particular case. Even though the above orders do not specifically mention about exercise of such power the orders will not be vitiated and the non-mentioning of the specific provision is not fatal to its sustainability. Since the decision is taken by the Council of Ministers, it can very well be construed as a decision taken within the ambit and scope of Rule 3 Chapter I Kerala Education Rules and minor change in procedures if any, with respect to the provisions in Chapter V will not vitiate the sanction."

After having found that justification for granting schools of their choice, the Government cannot now fall back on the rules to deny the very same benefits to the Sabarmati Society. Further, the Government themselves conceded that the people in that area as well as several other organisations have been clamouring for establishment of a school with primary, high school and +2 classes for the last several years. In fact, several persons of the locality including students have got themselves impleaded in these writ appeals to support the case of the Society in its quest to start a school in the locality. As such, as held by the learned Single Judge, Government

cannot take the plea that the application submitted by the Subarmathi Society cannot be considered on the ground that no notification has been issued by the Government as contemplated under Chapter V of the Kerala Education Rules. In the wake of paragraph 6 of Ext. P33, the contention of the Government sounds hollow and it seems that the Government is trying to find out one reason or other to deny the people of the locality the benefit of a school to cater to their educational needs, that too, in a locality predominantly inhabited by the weaker sections of the society, admittedly, only on the ground of financial burden to the Government resulting from such a grant.

18. Of course, in the appeal memorandum, the appellant-State has taken a contention that the sanctioning of those schools in the other places was in fact breaching the policy decision and without following the procedure contemplated under Chapter V of the KER and therefore the Government have constituted a review committee to examine all the cases where sanction has been given to start new aided schools and the cases of upgrading existing aided schools. We are not inclined to entertain such a contention at this late stage, which contention was conspicuously absent before the learned Single Judge. Further, the Government has not chosen to place before us any material whatsoever in support of that contention. Whatever that be, the Government cannot approbate and reprobate. After having found it necessary to sanction those schools, finding special circumstances which exact special circumstances are very much evident in the present case also, the Government cannot now suddenly take a turn around and say that the granting of other schools were also against the policy decision and without complying with the procedure prescribed under Chapter V of the KER. For all these reasons, we do not find any merit in the contentions in the writ

appeals and the same are liable to be rejected.

However, we are of opinion that it is not proper to straightaway direct the Government to accord sanction to the 1st respondent-Society in W.A.No. 1326/2006 to start a new school in Ward V of Pulimath Panchayat in Attingal Educational District. That can be done only after Government satisfy themselves as to whether the Society has all the facilities and other conditions prescribed for starting a new school. Therefore, while quashing Ext. P33 order, which the learned Single Judge has not done, we direct the Government to consider the application of the 1st respondent-Society for permission to start the school as applied for by them, if they satisfy all the criteria prescribed for sanctioning of a new school other than those which have been the subject matter of these writ appeals and found in favour of the Society.

The writ appeals are disposed of as above. But, we do not make any order as to costs.

Sd/- V.K. Bali, Chief Justice.

Sd/- S. Siri Jagan, Judge.

Tds/